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No. 08-656

In the Supreme Court of the United States

TERESA JEZIERSKI, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

EDWIN S. KNEEDLER
Acting Solicitor General
Counsel of Record
MICHAEL F. HERTZ
Acting Assistant Attorney General
DONALD E. KEENER
ROBERT N. MARKLE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that it lacked jurisdiction to review the Board of Immigration Appeals' denial of petitioner's motion to reopen immigration proceedings under 8 U.S.C. 1252(a)(2)(B)(ii) and (D).

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 543 F.3d 886. The decision of the Board of Immigration Appeals denying petitioner's motion to reopen (Pet. App. 11a-13a) is unreported. A prior decision of the Board of Immigration Appeals dismissing petitioner's appeal (Pet. App. 14a-17a) is unreported. The decision of the immigration judge (Pet. App. 18a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 2008. A petition for a writ of certiorari was filed on November 17, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1996, Congress amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to expedite the removal of criminal and other illegal aliens from the United States. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. As relevant here, Congress amended the INA to limit judicial review of certain discretionary decisions of the Attorney General. As amended, the relevant section of the INA now provides that no court shall have jurisdiction to review any

> decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. 1252(a)(2)(B)(ii). The phrase "this subchapter" refers to Title 8 of the United States Code, Chapter 12, Subchapter II, which is codified at 8 U.S.C. 1151-1381 and pertains broadly to immigration matters. See *Van Dinh* v. *Reno*, 197 F.3d 427, 433 (10th Cir. 1999).

In 2005, Congress amended the INA to include the following provision:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D), as added by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310.

b. The Board of Immigration Appeals (Board) may reopen any proceedings in which it has previously entered a decision. 8 U.S.C. 1229a(c)(7). A motion to reopen must be based on previously unavailable, material evidence. 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c). Subject to limited exceptions, an alien may file only one motion to reopen, and such a motion must be filed within 90 days of the entry of the final order of removal. 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2).

Based on a strong interest in finality, motions to reopen are disfavored, and the movant must meet a heavy burden to satisfy these requirements. *INS* v. *Abudu*, 485 U.S. 94, 107-108, 110 (1988); *In re Coelho*, 20 I. & N. Dec. 464, 473 (B.I.A. 1992). That is because "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS* v. *Doherty*, 502 U.S. 314, 323 (1992). The Board has broad discretion in adjudicating a motion to reopen, and it "has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a); see *Abudu*, 485 U.S. at 110.

c. If an alien applies for adjustment of status to that of a lawful permanent resident based on a marriage to a United States citizen, and the marriage is less than two years old, adjustment of status is granted on a conditional basis. See 8 U.S.C. 1186a(a)(1) and (g)(1). The conditional status remains in effect for a two-year period, after which the alien must satisfy additional requirements to remove the conditional basis of her legal residency, including a joint petition and an interview with her spouse. 8 U.S.C. 1186a(c)(1). If the spouse

refuses to participate in this process, however, the alien may file the petition alone and request a waiver of the joint-filing requirement. See 8 U.S.C. 1186a(c)(4).

In order to be eligible for such a waiver, the alien must establish one of the following:

> (A) extreme hardship would result if such alien is removed,
>
> (B) the qualifying marriage was entered into in good faith by the alien spouse, but the qualifying marriage has been terminated (other than through the death of the spouse) and the alien was not at fault in failing to meet the requirements of paragraph (1) [providing for joint filing], or
>
> (C) the qualifying marriage was entered into in good faith by the alien spouse and during the marriage the alien spouse or child was battered by or was the subject of extreme cruelty perpetrated by his or her spouse * * * and the alien was not at fault in failing to meet the requirements of paragraph (1).

8 U.S.C. 1186a(c)(4). Even if the alien establishes eligibility for a waiver, the ultimate determination whether to grant a waiver is entrusted to the discretion of the Attorney General and the Secretary of Homeland Security. *Ibid.*; see 8 U.S.C. 1103.

2. Petitioner is a native and citizen of Poland. Pet. App. 19a. She was admitted to the United States as a non-immigrant visitor in May 1993 and has remained here beyond the time authorized. *Ibid.* In January 1994, she married a United States citizen. *Ibid.*

Petitioner's husband filed an immigrant visa petition with the former Immigration and Naturalization Service

(INS)[1] on her behalf, and petitioner filed an application for permanent residence on a conditional basis. Pet. App. 19a. In May 1994, petitioner and her husband appeared for an INS interview. *Ibid.* By July 1994, petitioner and her husband had separated and were living apart. *Id.* at 20a.

In October 1994, the INS approved petitioner's application and adjusted her status to that of a permanent resident on a conditional basis. Pet. App. 19a. In September 1996, petitioner petitioned the INS to remove the conditions on her permanent resident status, and she sought a waiver of the joint-petition requirement under 8 U.S.C. 1186a(c)(4)(B), alleging that she entered into her marriage in good faith but that she was in the process of getting divorced. Pet. 19a-20a; see Administrative Record (A.R.) 328. In February 1997, petitioner's divorce was finalized. A.R. 310-312, 332.

In October 2003, the Department of Homeland Security (DHS) denied petitioner's application for a waiver. Pet. App. 20a. It explained that, at the time petitioner filed her waiver application, she and her husband had not yet been divorced, so that she was "not eligible for a waiver based upon a good-faith marriage that terminated in divorce" under 8 U.S.C. 1186a(c)(4)(B). A.R. 332. Moreover, DHS concluded that even if petitioner had been eligible for such a waiver, she failed to prove that her marriage was bona fide. *Ibid.* DHS observed that petitioner and her husband "separated and began living apart * * * just seven months after [their] marriage," and that petitioner and her husband had resided

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[1] On March 1, 2003, the INS ceased to exist as an agency within the Department of Justice and its enforcement functions were transferred to the Department of Homeland Security, pursuant to the Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.*

together during only one month of their marriage. *Ibid.* DHS further noted that, at the time petitioner was granted conditional permanent-resident status, she and her husband had already separated and were living apart. *Ibid.* Based on the evidence submitted, DHS concluded that petitioner's marriage was "a marriage of convenience entered into solely to gain an immigration benefit." *Ibid.* DHS therefore terminated petitioner's conditional permanent-resident status. A.R. 333; Pet. App. 21a. DHS then charged petitioner with being removable as an alien whose conditional permanent-resident status had been terminated. Pet. App. 18a; A.R. 339-340; see 8 U.S.C. 1227(a)(1)(D).

Petitioner appeared with counsel before an immigration judge (IJ). She denied that she was removable as charged and renewed her request for a waiver under 8 U.S.C. 1186a(c)(4)(B) by submitting her waiver application to the IJ for reconsideration. A.R. 208-210. The IJ noted that DHS had determined that petitioner's marriage was not bona fide, but continued her hearing for almost two years in order to permit her to obtain evidence to show that her marriage was bona fide. A.R. 211.

The IJ held a hearing on petitioner's waiver application in February 2006. Petitioner appeared with counsel and testified on her own behalf. When asked by the IJ whether petitioner would seek any form of relief other than the renewal of her waiver petition, her counsel said that he did not know whether she would be eligible for cancellation of removal based on the length of her stay in the United States. A.R. 219. The IJ asked petitioner several questions to determine whether she would be eligible for cancellation of removal and concluded that she was not eligible for that relief because she lacked a

qualifying relative (spouse, parent, or child) to whom her removal would pose a hardship. A.R. 219-224; see 8 U.S.C. 1229b(b)(1)(D) (to be eligible for cancellation of removal, alien must demonstrate, *inter alia*, "that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence").

The IJ denied petitioner's waiver application. Pet. App. 18a-30a. He first determined that petitioner was removable as charged because DHS terminated her conditional permanent-resident status. *Id.* at 22a. The IJ then reviewed petitioner's testimony and the documentary evidence she submitted, *id.* at 22a-24a, and concluded that petitioner failed to establish that her marriage was bona fide, *id.* at 26a. The IJ found that petitioner was not credible and that she did not "overcome her weak and unpersuasive testimony by sufficient corroborative evidence." *Ibid.* The IJ explained that there was no evidence of any period of courtship prior to the marriage, *ibid.*; that "the timing of [her] marriage cast[] doubt on her testimony that the marriage was entered into in good faith," *ibid.*; and that petitioner provided "unpersuasive" testimony regarding the reasons for the break-up of her marriage, *id.* at 27a.

The IJ also noted that petitioner's documentary evidence did not support the view that her marriage was bona fide, because the fact that petitioner maintained a joint savings account with her husband and registered a car with him after they separated "suggest[ed] that [petitioner] was still trying to maintain the appearance that she was residing with her husband." Pet. App. 27a. The IJ also determined that the affidavits petitioner provided from family and friends were "general in na-

ture," were obtained after petitioner and her husband separated, did not establish that petitioner "resided together with her husband for any period of time at all," and "only support[ed] the fact that [petitioner] entered into a marriage with her husband on January 15, 1994." *Id.* at 28a. The IJ also pointed out that petitioner filed her income taxes using single status from 1994-1996, for the entire time she was married. *Id.* at 29a. The IJ concluded that the record lacks "really any evidence that [petitioner] entered into a bona fide marriage," and the IJ therefore denied her request for waiver of the joint-petition requirement under 8 U.S.C. 1186(c)(4)(B). Pet. App. 28a-29a; see *id.* at 27a (marriage was "a matter of convenience for immigration purposes").

The IJ then granted petitioner's request for voluntary departure and advised her of the consequences of failing to depart within the voluntary departure period, including that she would be rendered ineligible for various forms of discretionary relief for a period of ten years. Pet. App. 31a-35a.

3. Petitioner's counsel filed a notice of appeal with the Board, stating that petitioner intended to challenge the IJ's denial of her Section 1186a(c)(4)(B) waiver request on the ground that the record supported petitioner's contention that her marriage was bona fide. A.R. 168. Although petitioner's counsel stated in the notice of appeal that he intended to file an opening brief, *ibid.*, he apparently did not do so.

The Board affirmed. Pet. App. 14a-17a. It reviewed petitioner's testimony and evidence, noted that the IJ found that petitioner "lacked credibility," and concluded that the IJ "correctly decided that [petitioner] did not enter into her marriage in good faith" and therefore correctly denied her request for a waiver under 8 U.S.C.

1186a(c)(4)(B). Pet. App. 15a-16a. The Board then upheld the IJ's grant of voluntary departure and informed petitioner that she was required to depart the United States within 60 days or she would be ineligible for various forms of discretionary relief for ten years. *Id.* at 16a-17a.

4. Petitioner retained new counsel and filed a motion to reopen her immigration proceedings. A.R. 18-27. In the motion, petitioner alleged that her prior attorney had been ineffective because he failed to request a hardship waiver under 8 U.S.C. 1186a(c)(4)(A), failed to request cancellation of removal, and failed to file a brief in support of her appeal to the Board. A.R. 19-20. Petitioner also moved to stay or extend her period of voluntary departure. A.R. 23-27. Petitioner did not allege, either in her motion to reopen or in her reply brief in support of the motion, that she was prejudiced because the outcome would have been different if her former attorney had sought one of the alternative forms of relief or filed an appellate brief.

The Board denied petitioner's motion to reopen. Pet. App. 11a-13a. It explained that, although petitioner complied with the procedural requirements for raising an ineffective assistance claim that the Board established in *In re Lozada*, 19 I. & N. Dec. 637 (B.I.A. 1988), "she has failed to demonstrate prejudice flowing from the alleged ineffective assistance of counsel." Pet. App. 12a (citing *Mojsilovic* v. *INS*, 156 F.3d 743, 749 (7th Cir. 1998), and *Pop* v. *INS*, 279 F.3d 457, 460-461 (7th Cir. 2002)). The Board noted that petitioner's "dissatisfaction with her former counsel's strategy in pursuing relief is not grounds for reopening based on ineffective assistance of counsel." *Ibid.*

The Board observed that petitioner "offered no evidence in her motion to establish that she would have prevailed if her former attorney had pursued these forms of relief." Pet. App. 12a. With respect to petitioner's claim that her attorney should have requested other forms of relief, the Board determined that there was no prejudice, because "after questioning [petitioner] regarding potential forms of relief, the Immigration Judge concluded that she was ineligible for cancellation of removal based on her lack of a qualifying relative." *Id.* at 12a-13a. With respect to petitioner's claim based on her former attorney's failure to file an appellate brief, the Board also determined that petitioner failed to show prejudice, because "[t]he record reflects that the Board reviewed the Immigration Judge's decision and affirmed the results of the decision," and petitioner did not explain how "further development of the arguments contained in her Notice of Appeal * * * might have led to a different result." *Id.* at 13a.

The Board apparently did not rule on petitioner's motion to stay or extend her period of voluntary departure. Petitioner has not demonstrated that she departed from the United States within the time allowed under her voluntary departure order.

5. The court of appeals dismissed petitioner's petition for review, holding that it lacked jurisdiction to review the Board's denial of petitioner's motion to reopen under 8 U.S.C. 1252(a)(2)(B)(ii). Pet. App. 1a-10a.[2] The court explained that it had held in several recent decisions that "there is no power of judicial review of petitions to reopen removal proceedings unless the petition presents a question of law" or a constitutional issue be-

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[2] The government did not argue that the court lacked jurisdiction.

cause the Board's decision to grant or deny a motion to reopen is a "discretionary decision." *Id.* at 2a.

The court then determined that petitioner did not raise any question of law, because the Board has not adopted a legal rule "that entitles the alien to reopen his removal proceeding on the basis of ineffective assistance of counsel," even if she has satisfied the procedural requirements the Board adopted in *Lozada*. Pet. App. 5a-6a.[3] Rather than alleging a legal or constitutional error, the court observed, petitioner's claim amounted to a challenge to the Board's "exercise of discretion." *Id.* at 7a; see *id.* at 10a.

ARGUMENT

Petitioner seeks review of the court of appeals' determination that 8 U.S.C. 1252(a)(2)(B)(ii) precluded it from reviewing the Board's denial of her motion to reopen immigration proceedings. Pet. i. The courts of appeals have divided on that question, but review would be premature at this time. Moreover, this case would not be a suitable vehicle for addressing the existing tensions in lower court authority. Because petitioner could not in any event show that the Board abused its discretion in denying the motion to reopen and could not show that she would receive a waiver of the joint-petition requirement or cancellation of removal, petitioner cannot ultimately succeed on the merits of her challenge to the removal order. The petition therefore should be denied. In the alternative, the Court should grant the petition, vacate the judgment below, and remand the case for further consideration in light of the government's position stated herein.

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[3] The court noted that petitioner did not raise any constitutional claim. Pet. App. 8a-9a.

1. a. In the decision below, the Seventh Circuit held that it lacks jurisdiction to consider the Board's denial of a motion to reopen under 8 U.S.C. 1252(a)(2)(B)(ii). Pet. App. 2a (citing *Kucana* v. *Mukasey*, 533 F.3d 534 (7th Cir. 2008), petition for cert. pending, No. 08-911 (filed Oct. 3, 2008), and *Huang* v. *Mukasey*, 534 F.3d 618 (7th Cir.), cert. denied, 129 S. Ct. 737 (2008)). In reaching that conclusion, the Seventh Circuit has reasoned that the Board's decision to grant or deny a motion to reopen is a "decision or action * * * the authority for which is specified under" the relevant subchapter of the INA (8 U.S.C. 1151-1381) to be in the discretion of the Attorney General, 8 U.S.C. 1252(a)(2)(B)(ii), because it is based on a regulation that the Attorney General promulgated to authorize the Board to reopen proceedings, which in turn specifies that the power to grant or deny a motion to reopen is within the discretion of the Board. *Kucana*, 533 F.3d at 536-537; see Pet. App. 2a-3a.

The Third, Fifth, Eighth, Ninth, and Tenth Circuits have reached a contrary conclusion, holding that 8 U.S.C. 1252(a)(2)(B)(ii) does not bar judicial review of the Board's denial of a motion to reopen. See *Jahjaga* v. *Attorney Gen.*, 512 F.3d 80, 82 (3d Cir. 2007); *Zhao* v. *Gonzales*, 404 F.3d 295, 302-303 (5th Cir. 2005); *Miah* v. *Mukasey*, 519 F.3d 784, 789 n.1 (8th Cir. 2008); *Medina-Morales* v. *Ashcroft*, 371 F.3d 520, 528-529 (9th Cir. 2004); *Infanzon* v. *Ashcroft*, 386 F.3d 1359, 1361-1362 (10th Cir. 2004). The Fifth, Eighth, and Ninth Circuits have explained that a decision by the Board to grant or deny a motion to reopen is not a decision "the authority for which is specified" under the relevant subchapter of the INA "to be in the discretion of the Attorney General," 8 U.S.C. 1252(a)(2)(B)(ii), because the Board's discretionary authority to act on a motion to

reopen is specified in a regulation, not a statutory provision within the relevant subchapter itself. See *Zhao*, 404 F.3d at 302-303; *Miah*, 519 F.3d at 789 n.1; *Medina-Morales*, 371 F.3d at 528-529.

The Tenth Circuit has reached the same result through a different analysis, concluding that Section 1252(a)(2)(B)(ii) does not preclude jurisdiction over a motion to reopen because "[a] motion to reopen * * * is separately authorized by 8 U.S.C. § 1229a(c)(6)" and because 8 U.S.C. 1252(b)(6), which directs courts to consolidate appeals of denials of motions to reopen with appeals of the order sought to be reopened, assumes that courts of appeals generally have jurisdiction to review denials of motions to reopen. *Infanzon*, 386 F.3d at 1361-1362. The Third Circuit has come to the same conclusion in the context of a motion to reissue a Board decision, which it treated as a motion to reopen. See *Jahjaga*, 512 F.3d at 82.[4]

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[4] Contrary to petitioner's suggestion (Pet. 13), there are not ten circuits that have rejected the argument that Section 1252(a)(2)(B)(ii) precludes judicial review of the denial of a motion to reopen. Many of the cases petitioner cites (Pet. 13-14) do not mention jurisdiction at all. See *Belle* v. *United States Att'y Gen.*, No. 08-11146, 2008 WL 4649392 (11th Cir. Oct. 22, 2008) (unpublished); *Soto* v. *Mukasey*, No. 08-72029, 2008 WL 4613593 (9th Cir. Oct. 17, 2008) (unpublished); *Zhang* v. *Mukasey*, 543 F.3d 851 (6th Cir. 2008); *Dioubate* v. *Mukasey*, 296 Fed. Appx. 335 (4th Cir. 2008) (unpublished); *Zequiraj* v. *Mukasey*, 296 Fed. Appx. 206 (2d Cir. 2008) (unpublished); *Meda-Morales* v. *Mukasey*, 293 Fed. Appx. 431 (8th Cir. 2008) (unpublished); *Sunarno* v. *Mukasey*, 293 Fed. Appx. 8 (1st Cir. 2008) (unpublished), petition for cert. pending, No. 08-7730 (filed Dec. 9, 2008). Of the cases that mention jurisdiction, several do not address the question whether 8 U.S.C. 1252(a)(2)(B)(ii) precludes judicial review of the Board's denial of a motion to reopen under 8 U.S.C. 1252(a)(2)(B)(ii). See *Alvarado-Vallardes* v. *Mukasey*, 296 Fed. Appx. 419, 420 (5th Cir. 2008) (unpublished); *Baig* v. *Attorney Gen.*, No. 08-1073, 2008 WL 4573006, at *1 (3d Cir. Oct. 15, 2008) (unpublished);

Some circuits that have held that Section 1252(a)(2)(B)(ii) does not automatically bar judicial review of the denial of a motion to reopen have stated that the court nonetheless lacks jurisdiction if the INA bars judicial review of the underlying order that the alien seeks to reopen. See, *e.g.*, *Assaad* v. *Ashcroft*, 378 F.3d 471, 474-475 (5th Cir. 2004); *Sarmadi* v. *INS*, 121 F.3d 1319, 1322 (9th Cir. 1997). The discretionary forms of relief petitioner seeks (waiver under 8 U.S.C. 1186a(c)(4)(A) and (B) and cancellation of removal under 8 U.S.C. 1229b(b)) are "decision[s] or action[s]" the authority for which is specified under the relevant subchapter to be in the discretion of the Attorney General. 8 U.S.C. 1252(a)(2)(B)(ii). Thus, it seems likely that other courts besides the Seventh Circuit would decline to exercise jurisdiction over petitioner's claim. Nonetheless, because the court below did not consider such

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Lopez v. *Mukasey*, No. 07-9549, 2008 WL 3094052, at *2 (10th Cir. Aug. 7, 2008) (unpublished). Moreover, as indicated, many of the cited decisions are unpublished and do not establish circuit precedent. Further, *Panjwani* v. *Gonzales*, 401 F.3d 626 (5th Cir. 2005), addresses IIRIRA's transitional rules, not the current jurisdictional provisions in the INA. *Id.* at 629-632. Therefore, none of those decisions conflicts with the decision below on the question whether Section 1252(a)(2)(B)(ii) bars judicial review of the denial of a motion to reopen.

Petitioner cites (Pet. 19-23) various cases addressing whether Section 1252(b)(2)(B)(ii) bars judicial review of *other* types of claims (such as challenges to denials of motions for continuances or motions for reconsideration). Those cases, however, do not shed light on whether there is jurisdiction over petitioner's claim, which is limited to the specific context of motions to reopen. In any event, there does not appear to be any circuit split on the question whether Section 1252(b)(2)(B)(ii) bars review of the denial of a motion for reconsideration, because of all of the cases petitioner cites (Pet. 22), only one case directly addresses that question. See *Johnson* v. *Mukasey*, 546 F.3d 403, 404 (7th Cir. 2008).

an argument, and because there are other reasons why further review is appropriate in this case, it is unnecessary to address that question.

b. After reexamining its prior filings on this issue, the government has concluded that the majority position represents the better reading of the statute. The relevant statutory text requires that the "authority" for the "decision or action" at issue—here, the denial of a motion to reopen immigration proceedings—be "specified under this subchapter [Subchapter II of Chapter 12 of Title 8] to be in the discretion of the Attorney General." 8 U.S.C. 1252(a)(2)(B)(ii).

Although the relevant statutory "subchapter" provides that "[a]n alien may file one motion to reopen," 8 U.S.C. 1229a(c)(7)(A); specifies that the motion "shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material," 8 U.S.C. 1229a(c)(7)(B); and provides a deadline for the filing of such a motion, 8 U.S.C. 1229a(c)(7)(C), it does not "specif[y]" that motions to reopen may be granted "in the discretion of the Attorney General." Rather, a regulation provides that the Board has broad discretion to grant or deny a motion to reopen. See 8 C.F.R. 1003.2(a) ("The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board * * *. The Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief."); see also 8 C.F.R. 1003.23(b)(3) (IJ has discretion to grant or deny motion to reopen). Given the general presumption in favor of judicial review, *INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001), and the terms of Section 1252(a)(2)(B)(ii), the government agrees with the majority of circuit courts that the

Board's discretionary decision to deny a motion to reopen is not covered by the jurisdictional bar in 8 U.S.C. 1252(a)(2)(B)(ii). The government did not argue otherwise to the court below. See Gov't C.A. Br. 1, 7-12.[5]

2. As discussed above, the courts of appeals are divided with respect to the underlying question upon which petitioner seeks review. Despite petitioner's contrary assertion, Pet. 12, this Court's plenary consideration is not warranted at this time, because the conflict in lower-court authority may well resolve itself without this Court's intervention, and because the issue concerns a narrow issue of reviewability that is unlikely to affect the outcome of many cases.

In its decision in this case, the Seventh Circuit relied upon its prior decision in *Kucana*. In that case, the court overruled *Singh* v. *Gonzales*, 404 F.3d 1024, 1026-1027 (7th Cir. 2005), which held that Section 1252(a)(2)(B)(ii) does not preclude judicial review of the denial of a motion to reopen immigration proceedings.

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[5] Because the United States agrees that there is jurisdiction over petitioner's claim that the Board abused its discretion in denying her motion to reopen, there is no need to consider whether judicial review is available on the alternative ground that petitioner raises a "question[] of law" under 8 U.S.C. 1252(a)(2)(D). It is worth noting, however, that the court below did not opine on whether a "mixed question of law and fact" (Pet. 23-24) qualifies as a "question[] of law." Moreover, to the extent that petitioner now attempts to claim that she raised a "constitutional claim[]" within the meaning of 8 U.S.C. 1252(a)(2)(D), the court of appeals found that petitioner waived that claim. See Pet. App. 8a-9a; see also Gov't C.A. Br. 17 n.4 (arguing that petitioner waived any such constitutional claim); Pet. C.A. Br. 8 (claiming "a statutory right to be represented" by effective counsel rather than a constitutional right). In any event, an alien does not have a constitutional right to effective assistance of counsel in removal proceedings. See *In re Compean*, 24 I. & N. Dec. 710, 726 (Att'y Gen. 2009).

See *Kucana*, 533 F.3d at 538. The *Kucana* opinion stated that it had "been circulated * * * to all active judges" and that "[a] majority did not favor a hearing en banc"; the opinion also noted, however, that five judges had voted to rehear the case en banc. *Ibid.*; see Pet. 34 (acknowledging that five judges wished to reconsider question presented en banc). There accordingly is some prospect that the Seventh Circuit may reconsider its ruling on the question presented en banc.

Further, the court below did not have the opportunity to fully consider the government's position on the question presented. The government's brief below did not challenge jurisdiction, and the court did not request supplemental briefing on that issue before holding that it lacked jurisdiction. Although the government did state its view that Section 1252(a)(2)(B)(ii) permits judicial review of a denial of a motion to reopen in supplemental briefing in *Kucana*, the government's analysis rested in large part on the court of appeals' prior decision in *Singh*. See Gov't Supp. Br. at 4-6, *Kucana*, *supra* (No. 07-1002). Because the court of appeals in this case did not have the benefit of the government's position on the question presented, it would be prudent for this Court to decline to address the issue at this time.

There is, moreover, no pressing need for review by this Court, because the issue concerns a narrow aspect of judicial review in the courts of appeals affecting only one procedural feature of the conduct of removal proceedings. The Board's denial of a motion to reopen is reviewable only for abuse of discretion, a highly deferential standard. *INS* v. *Doherty*, 502 U.S. 314, 323 (1992). Under that standard, the court will defer to the Board's ruling unless the ruling inexplicably departs from established policies, was made without rational explanation,

or rested on an impermissible basis. *E.g.*, *Pelinkovic* v. *Ashcroft*, 366 F.3d 532, 536 (7th Cir. 2004).

The question whether such judicial review is available therefore is likely to affect the outcome of very few cases, as this case amply demonstrates: The Board manifestly did not abuse its discretion in denying the motion to reopen here. See pp. 18-20, *infra*. Nor is this case unusual in that respect: In fact, in almost all of the decisions petitioner cites that reviewed the Board's denial of a motion to reopen, see pp. 12-13 & note 4, *supra*, the courts concluded that the Board did not abuse its broad discretion in denying the motion to reopen. See *Miah*, 519 F.3d at 789-790; *Belle*, 2008 WL 4649392, at *1-*2; *Soto*, 2008 WL 4613593, at *1; *Alvarado-Vallardes*, 296 Fed. Appx. at 420-421; *Zequiraj*, 296 Fed. Appx. at 207-208; *Dioubate*, 296 Fed. Appx. at 336; *Baig*, 2008 WL 4573006, at *2-*3; *Zhang*, 543 F.3d at 854-855; *Meda-Morales*, 293 Fed. Appx. at *1; *Sunarno*, 293 Fed. Appx. at 9-11; *Lopez*, 2008 WL 3094052, at *3; *Ali* v. *United States Att'y. Gen.*, 443 F.3d 804, 814 (11th Cir. 2006); *Panjwani*, 401 F.3d at 632-633; *Infanzon*, 386 F.3d at 1362-1364. Review therefore is not warranted at this time.

3. Even if the issue were presently ripe for and warranted this Court's review, this case would be an unsuitable vehicle for resolving it.

a. First, the claim upon which petitioner sought to obtain review in the court of appeals—that the Board abused its discretion in denying her motion to reopen immigration proceedings—is meritless. In her motion to reopen, petitioner argued that her former attorney rendered ineffective assistance by failing to request a hardship waiver of the joint-petition requirement under

8 U.S.C. 1186a(c)(4)(A) and cancellation of removal, and because he failed to file an appellate brief. A.R. 19-20.

The Board denied the motion because it concluded that petitioner had not established prejudice, *i.e.*, that the outcome of the proceedings would have been different if counsel had taken those steps. Pet. App. 12a. With respect to her claim that her attorney should have sought a hardship waiver under 8 U.S.C. 1186a(c)(4)(A) and cancellation of removal, the Board noted that petitioner "offered no evidence in her motion to establish that she would have prevailed if her former attorney had pursued these forms of relief." Pet. App. 12a. Indeed, the Board concluded that the record affirmatively supported the contrary conclusion, because the IJ determined that petitioner "was ineligible for cancellation of removal based on her lack of a qualifying relative." *Id.* at 12a-13a. And the Board determined that petitioner did not make out a claim for reopening based on her attorney's failure to seek a hardship waiver, because "dissatisfaction with her former counsel's strategy in pursuing relief is not grounds for reopening based on ineffective assistance of counsel." *Id.* at 12a.

With respect to her claim that counsel was ineffective for failing to file an appellate brief, the Board observed that it had reviewed the record and rejected her claims on the merits, Pet. App. 13a; it did not dismiss the appeal because counsel failed to file an appellate brief. Although the court of appeals dismissed the petition for review on jurisdictional grounds, it too observed that petitioner failed to demonstrate prejudice, because, for example, "the Board did decide the merits" of petitioner's appeal even though her attorney failed to file a brief. *Id.* at 10a.

It is well-settled that an alien must demonstrate prejudice to justify reopening based upon a claim of ineffective assistance of counsel. See *In re Compean*, 24 I. & N. Dec. at 733-735; see also, *e.g.*, *Mojsilovic* v. *INS*, 156 F.3d 743, 749 (7th Cir. 1998). Petitioner did not argue below that the outcome would have been different with effective counsel; instead, she argued that failure to file an appellate brief is per se prejudicial, Pet. C.A. Br. 9, and that she was eligible for alternative forms of relief, but not that they would be granted, Pet. C.A. Reply Br. 2-6. Even now, petitioner has not explained how the outcome would have been different if not for her attorney's alleged errors. And even if petitioner made out a *prima facie* case for relief, the Board could nonetheless deny her motion to reopen in its broad discretion. See 8 C.F.R. 1003.2(a). There is, accordingly, no reasonable prospect that the court of appeals would conclude that the Board abused its discretion in denying petitioner's motion to reopen.

b. Even if the court of appeals had exercised jurisdiction and granted the motion to reopen, it is extremely unlikely that the Board would grant petitioner the discretionary relief she seeks.

First, it is extremely unlikely that the Board would grant petitioner a waiver of the joint-filing requirement based on a divorce following a bona fide marriage under 8 U.S.C. 1186a(c)(4)(B). Whether to grant or deny such a waiver is entrusted to the discretion of the Attorney General and the Secretary of Homeland Security. See 8 U.S.C. 1186a(c)(4). The Board has already rejected this claim, explaining that petitioner failed to present sufficient evidence to prove her marriage was bona fide. Pet. App. 15a-16a. Indeed, the IJ expressly found that petitioner was not credible, *id.* at 26a, and the Board

upheld that finding, *id.* at 16a. Petitioner has not provided any explanation of what additional evidence she could provide to substantiate her claim that her marriage was bona fide.[6] If she did, it is unlikely the Board would grant her a waiver of the joint-petition requirement, because the Board is not inclined to exercise its discretion favorably when an alien was previously found to have offered incredible testimony to obtain an immigration benefit. See *In re S-Y-G-*, 24 I. & N. Dec. 247, 252 (B.I.A. 2007). Moreover, the fact that petitioner agreed to voluntarily depart the United States and apparently has not departed would be a significant negative factor in the Board's discretionary decision whether to grant Section 1186a(c)(4) relief. See *In re Barocio*, 19 I. & N. Dec. 255, 257-258 (B.I.A. 1985).[7]

Petitioner likewise would be extremely unlikely to prevail on her claim for a discretionary hardship waiver of the joint-petition requirement under 8 U.S.C. 1186a(c)(4)(A). In her motion to reopen before the Board, petitioner advanced no argument and pointed to no evidence suggesting that she had a basis for raising an extreme hardship claim under Section 1186a(c)(4)(A), and she has thus waived that claim. A.R. 18-27; see 8 U.S.C. 1252(d)(1); see also Gov't C.A. Br. 19-21. Even if petitioner were now able to provide evidence of extreme

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[6] Even if petitioner had identified additional evidence, she would further have to establish that it "was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. 1003.2(c)(1).

[7] Although failure to voluntarily depart within the time period permitted makes an alien ineligible for various forms of discretionary relief for a period of ten years, discretionary waiver of the joint-petition requirement is not one of those specified forms of relief. See 8 U.S.C. 1229c(d)(1)(B).

hardship, the most the IJ could do is continue her immigration proceedings in order to allow DHS to consider an application for such a waiver. Pet. C.A. Reply Br. 2 (citing 8 C.F.R. 216.5(f)); see *In re Anderson*, 20 I. & N. Dec. 888, 891-892 (B.I.A. 1994). The IJ is unlikely to exercise his discretion to grant a continuance, and DHS is unlikely to grant a hardship waiver, in light of the IJ's findings regarding petitioner's credibility, her apparent failure to depart the United States as required, and the fact that she has already been granted a continuance to substantiate a waiver claim. Moreover, petitioner appears to be barred from applying for a hardship waiver because a final order of removal has been entered against her. See 8 C.F.R. 216.5(a)(2) ("A conditional resident who is in exclusion, deportation, or removal proceedings may apply for the waiver only until such time as there is a final order of exclusion, deportation or removal."). There is therefore no reasonable prospect that petitioner would be granted a hardship waiver under 8 U.S.C. 1186a(c)(4)(A).

Finally, petitioner has no reasonable prospect of obtaining the discretionary relief of cancellation of removal. As an initial matter, petitioner did not raise any argument regarding cancellation of removal before the court of appeals, and she has thus waived the issue. In any event, the claim lacks merit. The IJ concluded that petitioner was not eligible for that relief because she lacks a spouse, parent, or child to whom her removal would pose a hardship. A.R. 219-224; see 8 U.S.C. 1229b(b)(1)(D). Petitioner has never attempted to explain how she would be eligible for cancellation of removal in light of her inability to satisfy that express statutory requirement. Finally, petitioner is now statutorily ineligible for cancellation of removal because she

overstayed her period of voluntary departure.[8] See 8 U.S.C. 1229c(d)(1)(B) (providing that "if an alien is permitted to depart voluntarily * * * and voluntarily fails to depart * * * within the time period specified, the alien," *inter alia*, "shall be ineligible, for a period of 10 years" to receive cancellation of removal); see 8 C.F.R. 1240.26(a) (same).

Because petitioner is either ineligible for or unlikely to be granted any of the underlying forms of relief that she seeks, this case is not a suitable vehicle for resolving the question whether 8 U.S.C. 1252(a)(2)(B)(ii) precludes judicial review of the denial of a motion to reopen. Further review is therefore unwarranted.

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[8] The Board instructed petitioner on June 2, 2007, that she was required to depart the United States within 60 days. Pet. App. 16a-17a. Petitioner posted her voluntary departure bond with the agency, thereby assuming the "privileges and penalties related to * * * voluntary departure." *In re Diaz-Ruacho*, 24 I. & N. Dec. 47, 50 (B.I.A. 2006). Petitioner has not shown that she departed the United States within the time permitted.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be granted, the decision below should be vacated, and the case should be remanded for further consideration in light of the government's position stated herein.

Respectfully submitted.

EDWIN S. KNEEDLER
Acting Solicitor General
MICHAEL F. HERTZ
Acting Assistant Attorney General
DONALD E. KEENER
ROBERT N. MARKLE
Attorneys

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